Asiedu v Boahene

2017 NY Slip Op 33486(U)

August 31, 2017

Supreme Court, Westchester County

Docket Number: Index No. 64403/2015

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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MABEL ASIEDU,

Plaintiff,

-against-

Index No. 64403/2015
DECISION & ORDER
Seq # 1

MANTEY KOFFI BOAHENE and RENEE HANNA,

Defendants.

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The following papers were read on the defendant's motion seeking an order of summary judgement on the issue of liability:

Notice of Motion/Affirmation/Exhibits A-E	1-7
Affirmation in Opposition/Affidavits in Opposition(2)	8-10
Reply Affirmation	11

The plaintiff, Mabel Asiedu ("Asiedu") commenced this action to recover damages for alleged personal injuries incurred on July 4, 2014, in a motor vehicle accident, when she was crossing the street at the intersection of Ashburton Avenue and Nepperhan Avenue in Yonkers, New York.

The defendant, Mantey Koffi Boahene ("Boahene") now files the instant motion seeking summary judgment on the issue of liability. Boahene argues that there is no evidence that he acted negligently and that his conduct was the proximate cause of the plaintiff's injuries.

In support of his motion, Boahene relies upon his affidavit, his attorney's affirmation, his examination before trial ("EBT") transcript, Asiedu's EBT transcript, his expert's affidavit, an uncertified copy of the police report[1], and a copy of the pleadings. Boahene asserts that Asiedu ran across a busy roadway without a crosswalk in a hazardous manner and was hidden from the view of Boahene until she darted into the left-turn lane, which was subject to a green left-turn traffic arrow at the time.

Boahene submitted an affidavit from Bernard Adler, P.E. ("Adler"), a professional engineer, licensed in the tri-state area. Adler visited the site of the accident on January 19, 2017 to examine the timing sequence of the traffic signal at the intersection of Ashburton Avenue and Nepperhan Avenue around 9:57 a.m., the approximate time of the accident. Adler also reviewed the EBT's , the bill of particulars, the police report, and the traffic signal upgrade plan for the subject intersection. Adler opines that the subject accident was caused by Asiedu's inattention and failure to see the steady red upraised pedestrian display as she entered the roadway and proceeded across the roadway while the steady red upraised hand (Do Not Walk) pedestrian display was illuminated and the vehicular traffic in the left turn lane of Ashberton Avenue, where Boahene's vehicle was traveling, had a green left turn arrow to proceed into the intersection.

In opposition, Asiedu submitted her affidavit, her attorney's affirmation and an affidavit from Stanley Fein, P.E. ("Fein"), a licensed professional engineer in New York. Fein visited the intersection of Ashburton Avenue and Nepparhan Avenue on May 23, 2017 to determine the dimension of the street and to evaluate the traffic devices. Fein also

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[1]The report is not in admissible form and the statements made to the police officer, are not admissible into evidence, therefore, it was not considered by this Court.

reviewed the police report, the EBT's and the supporting motion documents, including Adler's affidavit. Fein states that if Asiedu's testimony that she started to walk when the pedestrian countdown sign had just started to read numbers, then Boahene would not have had a green arrow until 21 seconds after Asiedu started crossing the street and by that time she would have reached the other side, based on her pace of a brisk walk. Fein opines with a reasonable degree of engineering certainty, that Boahene did not enter the left turning lane from a distance of approximately 20-30 yards before the intersection and did not have a green turn arrow at the intersection and suddenly pulled out into the crosswalk of the left turn lane that Asiedu was occupying, thereby causing the accident.

In reply, Boahene asserts that Asiedu's affidavit is inconsistent with her EBT transcript and should be disregarded.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). To demonstrate its entitlement to relief, the moving party must come forward with evidentiary proof that establishes the absence of any material issues of fact, (*McDonald v Mauss*, 38 AD3d 727, 728 [2d Dept 2007]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact, (*Winegrad* @ 853).

Upon review of the evidence and affidavits submitted, the Court finds that Boahene has not made out a prima facie case as a matter of law to show that he was not

comparatively negligent for the accident that occurred on July 4, 2014. "There can be more than one proximate cause of an accident" and "'[g]enerally, it is for the trier of fact to determine the issue of proximate cause'" (*Gobin v Gelgado*, 142 AD3d 1134, 1136 [2d Dept 2016] [citations omitted]). Therefore, although it would seem from the testimony, that Asiedu may have violated Vehicle and Traffic Law § 1112[2] by starting to cross the roadway when the walk sign had already begun to flash a number count down, a party moving for summary judgment on the issue of liability in a personal injury action has the burden of establishing, prima facie, not only the other party's negligence, but also the absence of his or her comparative fault (*Padilla v Biel*, 143 AD3d 959 [2d Dept 2016]).

Further, NY VTL § 1146(a) states in pertinent part that:

> Notwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary.

Additionally, "[a]lthough a driver facing a steady green light is entitled to proceed, he or she has a duty to yield the right-of-way to pedestrians lawfully within a crosswalk" (*see Barbieri v Vokoun*, 72 AD3d 853, 855 [2d Dept 2010]). "Vehicle and Traffic Law § 1146 imposes a superceding duty on a motorist to exercise due care to avoid hitting a pedestrian" (*Deitz v Huibregtse*, 25 AD3d 645, 646 [2d Dept 2006]). Therefore, "a driver is under a duty to keep a reasonably careful look out for pedestrians, to see what is there

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[2]VTL § 1112 states in pertinent part that, no pedestrian shall start to cross the roadway in the direction of a flashing DON'T WALK or upraised hand signal, but any pedestrians who have partially completed their crossing on the WALK or walking person signal shall proceed to a sidewalk or safety island while the flashing DON'T WALK or upraised hand signal is showing.

to be seen, and to use reasonable care to avoid hitting any pedestrian on the roadway." (*Id.*)

Asiedu testified and it is not disputed that she was within the unmarked crosswalk when she was struck by Boahene's vehicle. Boahene testified to having an unobstructed view of the intersection from 20-30 yards away and was traveling downhill at approximately 25 to 30 miles per hour. Boahene further testified that he did not observe any pedestrians when he entered the left turn lane and that as he was approaching the intersection in the left turn lane, his vehicle struck Asiedu when she jetted out from beyond an adjacent vehicle.

However, Asiedu was crossing at the unmarked cross-walk. Furthermore, a driver has a common-law duty to see that which he should have seen through the proper use of his senses, *(Barbieri* @ 856) and there is a question as to whether or not Boahene exercised that duty. Moreover, even if the plaintiff had been crossing at a point other than the crosswalk, she is not prohibited from doing so and crossing at such point is not negligence per se, if there is no proof in the record that the plaintiff entered the roadway knowing that the vehicle was within sight and thus not ceding the right of way to the motorist. (*Deitz v Huibregtse*, 25 AD3d 645 [2d Dept 2006]). Here, there is no proof in the record that Asiedu entered the roadway knowing that the vehicle was within sight, since she testified that she looked and did not see the vehicle prior to being struck and Boahene testified that he did not see Asiedu prior to striking her and therefore, could not state affirmatively that Asiedu saw his vehicle.

Lastly, the experts hired by the parties differ as to their findings, which are also partially based on assumptions that are questions of fact. Adler assumes that Asiedu was traveling at a normal pace, but Asiedu testified that she was in a brisk walk and was in a hurry. Also Fein assumes that the flashing light had just started when Asiedu began to cross, of which there is no evidence.

Accordingly, Boahene failed to come forward with evidentiary proof that establishes the absence of any material issues of fact. Therefore, the Court denies Boahene's motion for summary judgment on the issue of liability.

The parties are directed to appear at the settlement conference part in courtroom 1600 on September 26, 2017 at 9:15 a.m. The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
August 31, 2017

HON. SAM D. WALKER, J.S.C.